Thalbo Corporation and G. B. Motel Management d/b/a Ramada Inn Newburgh *and* Paulette DiMilta. Case 2–CA–24990

April 30, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The issue presented here is whether the administrative law judge correctly determined the amount of backpay owed discriminatee Paulette DiMilta.[1]

The National Labor Relations Board has considered the judge's decision in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Supplemental Order of the administrative law judge and orders that the Respondent, Thalbo Corporation and G. B. Motel Management d/b/a Ramada Inn Newburgh, Newburgh, New York, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order.

[1] On January 16, 1997, Administrative Law Judge Steven Fish issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Margit Reiner, Esq., for the General Counsel.
Joseph A. Saccomano, Jr. (Jackson, Lewis, Schmitzler & Tirupman), of White Plains, New York, for the Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. On July 13, 1994, the Board issued its Decision and Order in this proceeding (314 NLRB 367), in which it upheld the administrative law judge's findings that Respondent violated Section 8(a)(1) and (3) of the Act by refusing to reinstate employee Paulette DiMilta and ordered that Thalbo Corporation and G. B. Motel Management d/b/a Ramada Inn of Newburgh (Respondent) reinstate and make her whole for the discrimination against her.

After the United States Court of Appeals for the Second Circuit enforced the Board's Order, the Region, on November 27, 1995, issued a compliance specification and notice of hearing which was subsequently amended at the opening of the instant trial. Respondent filed an answer to the specification, which was also amended at the trial[1] which was held on April 25 and May 2, 1996.

Briefs have been received from the General Counsel and Respondent, and have been carefully considered.

Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. FACTS

A. *The Board Decision*

As noted, the Board found in agreement with the judge that Respondent unlawfully refused to reinstate DiMilta in violation of Section 8(a)(1) and (3) of the Act.

It also found, in accordance with Respondent's answer, that Thalbo Corporation and G. B. Motel Management, Inc. constitute a single-integrated enterprise and are a single employer within the meaning of the Act.

The judge found further that DiMilta had been employed by Respondent primarily as a bartender since 1985. She was out of work on sick leave for a "stomach ailment" starting on July 12, 1990. While she was out of work, the union organizing campaign started in which DiMilta became involved, notwithstanding her absence.

Shortly before the representation election was scheduled to be held, DiMilta requested to return to work. On January 23, 1991, DiMilta arrived at the hotel to discuss her reinstatement with Mary Conte, Respondent's general manager at the time. Although Conte was not available to speak with her, DiMilta did speak with another official of Respondent who indicated that she was happy that DiMilta would be returning to work. However, on that same day, DiMilta openly expressed her support for the Union in front of a number of people, which resulted in, according to the Act and the Board, Respondent deciding not to reinstate her in violation of Section 8(a)(1) and (3) of the Act.

B. *The Compliance Specification*

The specification alleges that the backpay period commenced on February 7, 1991, and that Respondent made a valid offer of reinstatement to DiMilta on July 25, 1995. The specification also set forth a formula for computation of the backpay for DiMilta, consisting of a projection of her weekly earnings at the time of discharge, adjusted for any wage increases that she would have received.

Respondent has not disputed any of the above assertions and calculations set forth in the specification. However, Respondent has disputed the termination date of DiMilta's backpay, arguing various alternative dates that it believes that her backpay period should end. It primarily contends that DiMilta is entitled to no backpay whatsoever, and that the instant proceeding should be dismissed because of a related district court proceeding.[2]

Absent such a finding, Respondent asserts that DiMilta is barred from recovering any backpay after October 1992, be-

[1] While the General Counsel requests in her brief that I reconsider my ruling to permit Respondent to amend its answer, I shall adhere to my decision to allow Respondent to do so.

[2] Respondent made a motion to dismiss the specification on that basis to the Board, which motion was referred to me for decision.

cause she returned at that time, or as of August 1994, because the bar that employed her was leased to a company independent from Respondent, or finally because she rejected a valid offer of reinstatement from Respondent in May 1995.

C. *The Federal Court Decision*

Subsequent to Respondent's failure to reinstate her in February 1991, DiMilta filed a Federal court action (Case 92 Civ. 6468) against Respondent and Helmut Rothermel, Respondent's food and beverage manager, alleging sexual harassment by both Respondent and its manager.

During the course of that litigation, DiMilta was deposed on February 9, 1993. During that deposition, she was asked the following questions and gave the following answers:

> Q. Besides the job at Stewart Air Force Base, have you had any other jobs since you left Ramada?
>
> A. No.
>
> Q. And why did you leave that job at Stewart?
>
> A. At Stewart, my husband and I had a deal that when I turned 45, I can retire. I just pushed it up six months.
>
> Q. So, is it fair to say that you are in retirement at this point?
>
> A. Yes.

DiMilta testified in the instant proceeding with respect to these responses that she gave during her deposition. According to DiMilta, she was very nervous and upset at the deposition, because she knew that she would be forced to reveal unpleasant details of the sexual harassment allegations. Therefore, DiMilta asserts that she did not listen carefully to the questions asked and that she gave sarcastic and flip responses, because she thought that everyone knew that she had been laid off from Stewart (her interim job).

DiMilta further testified that she neither retired nor had any deal with her husband to retire when she became 45. However, she claims that she and her husband had discussed cutting back on her hours from perhaps 40 to 30 or 20 hours a week when she reached 45, which would have been in April, 6 months after her layoff from Stewart. DiMilta added that her husband had in the interim lost his job working for General Motors in Tarrytown, so that any talk of her cutting down on her hours had been dissipated, since the family needed income from her to live.

Most significantly, DiMilta testified that she in fact began looking for work shortly after she was laid off from Stewart in October 1992, and continued to search for work in the same manner as she had during the period between her termination from Respondent in February 1991, until her hiring at Stewart in August 1991. This search consisted of answering ads in the paper, sending resumes to restaurants obtained from the yellow pages, and making personal visits and requests of various places such as department stores, doctors' offices, and hair and nail salons to see if they needed any secretarial help.

DiMilta testified further that she detailed her job search efforts on forms supplied to her by the NYS Department of Labor, which she filled out in order to obtain unemployment insurance. Since she had been advised by the Regional Office of the NLRB to keep detailed records of her job search efforts, she simply made copies of the DOL forms, and documented her job search efforts. Those forms were introduced into this record, and they reveal a listing of places that DiMilta testified that she visited or called for jobs, as well as a number of advertisements from newspapers for waitress, barmaid, bartender, restaurant help, receptionist, sales help, telemarketer, and other positions that DiMilta asserts that she answered.

The trial of the district court action was held, on consent of the parties, before Magistrate Mark D. Fox in early September 1994. Prior to the trial, DiMilta met with her attorney to prepare for her testimony. According to DiMilta, she told her attorney about the above-described documents that she had which detailed her search for work but did not show them to her attorney, because he told her they were not relevant. She claims further that her attorney told her that she had to prove sexual harassment, not whether she was looking for work or not.

At the trial itself, DiMilta did not recall whether she was asked about her retirement statement in her deposition, or whether she was questioned about her search for work. The record before the Magistrate was not introduced with this proceeding, since apparently no one ordered a copy of the record. However, copies of the closing statements made by the parties, which were submitted in writing, were introduced here.

These documents tend to show that there was some testimony with respect to those issues, although it clearly appears, consistent with DiMilta's testimony, that her job search records were not introduced with the record before the Magistrate nor was there any testimony that DiMilta had compiled such records.

The closing argument of DiMilta's attorney consisted of 18-1/2 pages. Only one-half of a page of this argument was devoted to the issue of DiMilta's job search. The remainder of the argument dealt with the sexual harassment issue and credibility issues in connection therewith. With respect to DiMilta's job search efforts, the statement reads as follows:

> After learning that Ramada would not re-employ her, plaintiff actively sought employment. She reported her efforts to the unemployment insurance office, as is required by law. She contacted approximately five prospective employers each week and, in August 1991, found employment at the Officer's Club, West Point. After her experience with Rothermel, plaintiff was understandably more selective about where she sought employment, desiring a more controlled environment with good lighting and a gentlemanly atmosphere. After one year of part time employ at the Officer's Club, plaintiff was laid off due to insufficient work. She has continued to seek comparable employment since her lay-off, but without success. At deposition, plaintiff testified that after being laid off from the Officer's Club, she retired, but, in fact, this was an impossible aspiration due to the tenuous state of the automotive industry, in which Michael DiMilta is employed and the couple's need for save for the future.

Similarly, the closing argument for Respondent's attorney consisted of 33 pages, of which a little more than a page was devoted to DeMilta's job search; and this discussion appears

to be as much of an attack on DiMilta's credibility in general as a specific attack on the adequacy of her search for work.

The statement did, however, assert that DiMilta's job search testimony "indicates that she is not really interested in working." It refers to the apparent testimony at trial by DiMilta that she "applied every week for a job of bartender but admitted that she didn't follow up." Additionally, the argument referred to testimony of another witness that there was a demand for daytime bartenders.

Specific reference to DiMilta's deposition testimony concerning retirement was made, and in fact her deposition testimony was quoted verbatim.

The statement then continues by quoting DiMilta's apparent trial testimony that she had not been in retirement, "even though she said so in her deposition because she was collecting unemployment money." Finally, it was argued that since unemployment checks would stop in 2 months, "DiMilta wasn't confused. She'd love to remain in retirement without working."

Lastly, the attorney for the individual defendant, Helmut Rothermel, submitted a closing argument of 15 pages. This document did make a reference to DiMilta's deposition testimony concerning her retirement, but did so primarily, if not solely, to attack her credibility. Thus it referred to DiMilta's apparent trial testimony that she had been desperately looking for work at the rate of five applications per week, as contrasted with her deposition testimony that she had retired. It was argued that DiMilta had committed perjury by such testimony, and contended that the Magistrate should therefore disregard all of her testimony since she had intentionally lied about this material fact.

On March 20, 1995, Magistrate Fox issued his decision consisting of 14 pages. He found that Respondent's supervisor, Rothermel, had in fact engaged in various acts of sexual harassment and sexual abuse against DiMilta and that Respondent was responsible for this conduct. He concluded that Respondent was, therefore, guilty of tolerating an "abusive work environment," and ordered make-whole relief for this conduct.

Although the Magistrate found that Rothermel had engaged in conduct that was physically threatening and humiliating, and which might have subjected him to a criminal sanction, it nevertheless dismissed the complaint against him personally. It is not totally clear to me why this was recommended, but it appears that plaintiff had not alleged the proper charge that would make Rothermel personally liable.

The Magistrate also made reference to the prior NLRB decision in this case, in evaluating plaintiff's claim that the Respondent's failure to rehire her was related to the sexual harassment that she was subject to. He concluded that while DiMilta had established that she had been subject to unwelcome sexual conduct, she had not proved that Respondent's decision not to rehire her was a result of her reaction to Rothermel's conduct. In that connection, the Magistrate relied on the NLRB decision which he concluded found that the failure to rehire her "stemmed from her employer's reaction to her union organizing effort."

The decision's first 10-1/2 pages consisted of a discussion of the merits of DiMilta's sexual harassment claims and credibility resolutions therein. The remaining three pages of the decision dealt with the appropriate relief. The Magistrate initially set forth the standard for the computation of backpay, and virtually awarded no backpay to DiMilta for the period while she was voluntarily on sick leave (July 1990 to February 1991), since she was unable to work during this period.

At that point, the Magistrate dealt with DiMilta's search for work and her alleged retirement as follows:

> Following the hotel's failure to rehire her, Plaintiff eventually found a job at the Officers' Club in Newburgh in August 1991 and remained in that position until a lay-off in October 1992. Her deposition testimony supports the conclusion that since then she had not been aggressive in seeking another job because, through an arrangement with her husband, she is currently in retirement, a retirement the commencement of which coincides with the layoff in October 1992. The record also contains evidence that she earned $12,000 from this job.

He then proceeded to discuss the calculation of backpay for DiMilta, and concluded that based on Respondent's records, she would have earned an average of $190 per week plus $57 in tips. Based on this calculation, he further concluded that "the above calculations support the inference that plaintiff's earnings at the Officer's Club were comparable to her earnings at the restaurant."

Therefore, he awarded her no backpay for the period of time that she worked at the Officer's Club, but did award backpay for the period between February 8 to August 30, 1991, of $7521 ($247 per week multiplied by 29 weeks plus vacation payments) plus interest, and $1000 for emotional distress pursuant to a statutory claim under N.Y. Exec. Law Section 296.

On March 21, the Magistrate's decision was approved by the district court, and a judgment was entered against Respondent in the sum of $10,171.91,[3] and dismissed the complaint against Rothermel.

This amount was paid by Respondent to DiMilta and has been reflected in the specification as interim earnings for DiMilta, prorated over the period of time covered by the district court award.

D. *The End of DiMilta's Employment at Stewart*

As noted above, DiMilta was employed at the Stewart Officer's Club which was located at West Point, New York, from August 1991 to September or October 1992 as a bartender.[4] According to DiMilta, she was told by the manager of the Officer's Club, whom she referred to as Mr. D, but whose name she did not recall, that she was being laid off because there was not enough work and too many bartenders.

Armand DiPoalo, the club manager of the Stewart Officer's Club, also testified as a witness for the General Counsel concerning the issue. He testified that he did not know anything about a layoff of DiMilta, nor why her employment ended, but that "apparently" she was no longer called by Stewart.

According to DiPoalo, the Club employed 5 regular bartenders and approximately 30 on-call or flex time bartenders,

[3] This sum included $1,650.91 in interest as of that date.

[4] Her interim earnings from that position are also reflected in the specification.

including DiMilta. The actual selection of which on-call bartenders to be employed was left to Stewart's bar manager. The bar manager never told DiPaolo that DiMilta was laid off, nor was he aware of any layoff at the time.

However, Stewart's records indicated that DiMilta prior to September 2, 1992, had been called on a regular basis 2 or 3 days a week, with September 2 being her last day. DiPoalo testified that "apparently" she was no longer called by Stewart, based primarily on the fact that Stewart's records indicated that she received unemployment insurance, which was not contested by Stewart, that her last day of work was September 2, 1992, and that she was kept on Respondent's roster as a flex employee.

DiPaolo also admitted that at the time that DiMilta stopped working for Stewart, there was less work available than usual for bartenders.

E. *The Change in Operation of the Bar*

While DiMilta was employed at Respondent, the bar was operated by G. B. Motel Management, Inc., one of the three entities which comprise the single integrated enterprise. G. B. Motel also operated the restaurant and the banquet rooms, while Thalbo Corporation operated the hotel portion of the business.

As of August 1, 1994, Thalbo entered into a lease agreement with Carol Davino Enterprises (Davino) providing that Davino would operate the bar, restaurant, and banquet rooms. At that time, G. B. Motel was dissolved.

Since August 1994, Davino has been operating these functions, and all employees performing these jobs have been employed by Davino.

Prior to Davino's taking over these operations, Respondent employed two bartenders. Both of these employees were hired by Davino.[5] Davino also hired the restaurant employees previously employed by Respondent and some of the banquet employees. The record does not reflect the number of restaurant and banquet employees previously employed by Respondent and/or how many of them were employed by Davino.[6]

F. *The Reinstatement Offers*

A letter from Respondent was sent to DiMilta, dated May 26, 1995. It reads as follows:

> May 26, 1995
>
> Ms. Paulette Dimilta
> 52 Surrey Rd.
> Chester, NY
>
> Dear Ms. DiMilta:
>
> We have an immediate opening at our front desk for a desk clerk. The position will be Friday, Saturday, Sunday and one additional day during the week. It will be either A shift or B shift. The hours for A shift is 7:00 m [sic] to 3:00 pm, B shift is 3:00 pm to 11:00 pm. As I have this opening now I need an immediate response. The position starts Tuesday May 23, 1995 for training.
>
> Please call me at the hotel 564–4500.
>
> Sincerely,
>
> /s/ Gary A. Miano, CHA
> General Manager

This letter was received by DiMilta on May 30. She immediately telephoned Gary Miano, Respondent's general manager, who informed DiMilta that he had a job for her at the front desk on Friday and Saturday afternoons and Sunday evenings. DiMilta agreed to come in the next day for an interview about the position.

At the interview, Miano informed DiMilta that the front office position would be on Friday, Saturday, and Sunday evenings, no afternoons, and at a salary of $6 per hour. DiMilta asked about her seniority and informed Miano that in order to be made whole as per the Board's decision, she could not be treated like a new employee. Miano replied that he was not concerned with the past, but only with the future, and that DiMilta would be a new employee with no seniority. DiMilta told Miano that she would think it over.

On Friday, June 2, DiMilta telephoned Miano and informed him that the offer was unacceptable. She told Miano that working on Sundays conflicted with her religious obligations and the pay scale was not acceptable. DiMilta explained that according to the decision of the administrative law judge, Respondent was required to make her whole, which meant giving her a job with the same hours, same days and not as a new employee, and she would, therefore, be entitled to any raises that might have been given.

In that connection, when DiMilta was employed by Respondent, she worked 4 days a week, Monday through Thursday, from 10:30 a.m. until 7:30 p.m. (Her shift was 11 a.m. until 7 p.m., but she would came in a half hour before the shift began to set up and stay a half hour later to cash out and wait for her relief.)

The offer of Respondent was, as noted, for Fridays, Saturdays, and Sundays on the evening shift, which ran from 10 or 11 p.m. until the following morning.

As for salary, when she was employed by Respondent, DiMilta was paid $5.60 per hour, plus tips which averaged $57 per week. As noted, the offer of a front desk position was for $6 per hour, which position offered no opportunity for tips.

Moreover, the compliance specification, which was not contested by Respondent for the second quarter of 1994, which is the last quarter that Respondent operated the bar, provides for a salary of $2,780.40 (plus tips) for DiMilta. This amount which accounted for raises given to Respondent's employees comes to approximately $6.70 per hour of salary (based on 32 hours per week over a 13-week period). As is noted above, the offer made by Respondent to DiMilta of $6 per hour did not include any tips. Thus if one were to prorate tips of $57 per week for a 32-hour week, this amounts to an additional $1.78 per hour.

As for DiMilta's comments about her religious obligations, she did not work on Sundays when she previously worked

[5] At least one of these bartenders was still employed by Davino at the time of the trial.

[6] The testimony given on this issue by Virginia Armour, Respondent's controller, was not very precise on this issue, but her testimony that Davino hired "the" restaurant employees and "some" of the banquet employees suggests that Davino hired all of the restaurant employees and "some" of the banquet employees.

for Respondent, and she was a Sunday school superintendent at her church which required her attendance on Sundays.

In late July 1995, Respondent, through a Board agent, conveyed another reinstatement offer to DiMilta. This offer had raised the salary to $7 per hour at the same front office position. Additionally, this new offer was for either three or four additional weekdays per week plus every other week on Sundays, all in the same day shift that she had worked on prior to Respondent's refusal to rehire her.

DiMilta initially agreed to accept this offer and start work on August 14. After postponing her start date on August 9, due to a jury duty summons, DiMilta by letter of August 18, 1995, declined Respondent's offers, due to her obtaining another position.

The specification ended DiMilta's backpay on July 25, 1995, stating, "at which time a valid offer of reinstatement was tendered to DiMilta."

II. ANALYSIS

A. *The Single-Employer Status of Thalbo Corporation and G. B. Motel Management Corp.*

Respondent denies in its answer that DiMilta was an employee of Thalbo Corporation and contends that at all times she was employed by G. B. Motel Management Corp.

However, in the underlying Board decision, the administrative law judge found and the Board affirmed that Thalbo and G. B. Motel Management Corp. were a single-integrated enterprise and a single employer within the meaning of the Act. This finding which was enforced by the court of appeals cannot be relitigated in this proceeding. *Emsing's Supermarket*, 299 NLRB 569, 571 (1990).

Moreover, I note that Respondent adduced no evidence in this compliance hearing to contradict this finding and in fact its only witness, Virginia Armour, testified that the Companies were "connected."

Accordingly, I find, consistent with the underlying case, that DiMilta was an employee of G. B. Motel and Thalbo, a single employer, and that both Companies, jointly and severally, are responsible for remedying the unfair labor practices committed by Respondent.

B. *The Alleged Preclusive Effect of the District Court Decision*

Respondent, relying on *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), argues that the decision of the district court, affirming Magistrate Fox's decision, is binding on the issue of backpay and precludes the Board from relitigating that issue in the instant proceeding. I disagree.

Initially, I would note that Board law is clear and consistent with respect to this issue. The Board is not precluded from litigating an issue involving the enforcement of the National Relations Act that a private party has litigated unsuccessfully, when the Board was not a party to the private litigation. *Precision Industries*, 320 NLRB 661, 662 (1996); *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Service Employees v. NLRB*, 982 F.2d 845 (2d Cir. 1993); *Albritton Communications*, 271 NLRB 201, 202 fn. 4 (1984), enfd. 766 F.2d 812 (3d Cir. 1985); *Bay Area Sealers*, 251 NLRB 89 (1984), enfd. 665 F.2d 970 (9th Cir. 1982).

The Board's position in this regard is premised on Section 10(a) of the Act which sets forth that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that had, has been or may be established by agreement, law, or otherwise," as well as the long-recognized principle that "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board, as a public agency acting in the public interest, not any person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Field Bridge*, supra at 322, citing *Amalgamated Utility Workers v. Consolidated Edison Co.*, NLRB, 309 U.S. 350, 362–364 (1940).

Thus, while *Donna Lee*, supra, is in disagreement with the Board's view on this issue in certain limited circumstances, I am bound by Board precedent which the Supreme Court or the Board has not reversed. *Bay Area*, supra at 104; *Ford Motor Co.*, 230 NLRB 716, 718 fn. 12 (1977). Therefore, I need go no further in my analysis to dispose of Respondent's contention, since admittedly the Board was not a party to the district court litigation.

However, since I also believe that *Donna Lee* is, in any event, clearly distinguishable from the instant matter, I do not deem it appropriate to discuss my reasons for such a conclusion.

First and foremost, I note the different posture of the instant case vis a vis the situation in *Donna Lee*. Thus here, unlike in *Donna Lee*, the compliance specification that was issued is part and parcel of the same case, Case 2–CA–24990, wherein the Board has already issued its decision, finding that Respondent has already violated Section 8(a)(1) and (3) of the Act. Indeed the instant decision is entitled "Supplemental Decision." Moreover, the Magistrate in fact relied on part of the Board's decision in making one of his findings to dismiss one of the allegations before him, in effect deferring to the Board decision on the issue of why Respondent chose not to rehire DiMilta. In such circumstances, it would be quite surprising for Magistrate Fox to believe that his decision would preclude the Board from remedying the very violation that he relied on to decide one of the issues before him. Therefore, I conclude that this distinction by itself is sufficient to distinguish this matter from *Donna Lee* and the rationale there.

Indeed, the facts here in my view demonstrate the wisdom of the Board's procedure of bifurcating its cases, and saving matters of backpay to the compliance phase of the proceeding to be decided, if necessary, by a supplemental hearing. These facts also point to further significant distinctions between this case and *Donna Lee*. Thus the backpay issues in the Magistrate's decision relied on by Respondent, i.e., that DiMilta "retired" in October 1992, and that she received "comparable" earnings at her interim job at Stewart to her earnings while employed by Respondent, were clearly a minor part of the litigation therein. These issues were covered in one page or less in the Magistrate's decision, as well as in the closing statements of all 3 parties, as compared to from 14 to 33 pages of text in these documents which were devoted to the primary issue litigated, of whether sexual harassment had been established.

This finding is again significantly different from *Donna Lee*, where in both the Board and court cases, there was only one essential and central issue, that of the validity of the contract between the Employer and the Union.

Also, unlike *Donna Lee*, significant if not determinative evidence was not presented at the court proceeding, that was introduced here. Thus DiMilta did not introduce her detailed records of her job search at the prior proceeding. Whether this omission was because of her own or her attorney's negligence is not determinative in my view. What is important is that such evidence could well have changed the Magistrate's decision that she had not been "aggressive" in seeking another job. It also, as I have noted, illustrates the wisdom of litigating job search and the Board procedures of backpay issues in a hearing separate from consideration of the merits of the underlying violation, where the parties would be more likely to concentrate on these supplementary issues and to present all relevant evidence.

This also gives rise to other important distinctions between *Donna Lee* and the instant matter. The court in *Donna Lee* observed that "no Board policy question is implicated in the determination that no contract exists. Nor is any precedent established by that determination which would have wide ranging effect on labor relations." Id. at 35. Further, the opinion noted that the case involved primarily the interests of two private parties, concerning the existence or nonexistence of what is essentially a private agreement. Finally, the court also emphasized that it is not unusual for a Federal court to rule on the issue of whether a collective-bargaining agreement is a valid contract.

These observations do not necessarily apply to the instant case. As indicated above, here the Board has already decided that a violation of the Act has been committed by Respondent and the failure to permit the Board to properly remedy a violation that it has found does in my view represent the implication of a broad policy question, unlike in *Donna Lee*.

Moreover, this case is not, like *Donna Lee*, a civil dispute between two private parties over the validity of a private contract, but a situation where an individual employee has been discriminated against, and that discrimination must be remedied by the Board, with its expertise in this area. Thus, while it is not unusual for the court to rule on the validity of a contract, as in *Donna Lee*, it is unusual for the court to make preliminary rulings on issues of remedying violations of the National Labor Relations Act concerning unlawful discrimination against employees.

In this connection, I note that there are several significant differences between how the Magistrate decided the backpay issues raised in the sexual harassment (Title VII) context, and current NLRB law and policies in these areas.

Board law holds that the finding of an unfair labor practice is presumptive proof that some backpay is owed, and that uncertainties are resolved against the employer as the wrongdoer. *La Favorita Inc.*, 313 NLRB 902, 903 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995); *WHLI Radio*, 233 NLRB 326, 329 (1977). Additionally, a backpay claimant need only make a reasonable good-faith effort to find jobs, and is not held to the highest standard of diligence. *Hansen Bros. Enterprises*, 313 NLRB 599, 608 (1993); *Landy Packing Co.*, 286 NLRB 141, 142 (1987). With respect to the efforts of an employee to search for work, the burden is on the employer to demonstrate that the employee did not make reasonable efforts to find interim work. *Regional Import & Export Trading Co.*, 318 NLRB 816, 820 (1995).

It is apparent that Magistrate Fox did not apply the above principles in making his findings concerning his award of backpay to DiMilta. I note that he concluded that DiMilta "had not been aggressive in seeking another job," which is clearly, as outlined above, not the Board standard for measuring claimant's efforts to find work. Moreover, the Magistrate also concluded that DiMilta's earnings at her interim job at Stewart were "comparable" to her earnings while at Respondent, and awarded no backpay to DiMilta for the period of time that she worked at Stewart. In reaching this calculation, he did not use the Board's standard formula of computing backpay by quarters, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), nor did he account for raises that DiMilta would have received had she remained at Respondent, as is required in Board proceedings. *WHLI*, supra at 330. Additionally, the Board does not merely decide whether earnings are "comparable," but makes as precise of a calculation as it can, using the Board standards, as related above. It also is notable that while under Board law, unemployment insurance received by the employee is not deducted from his gross wages, some courts, including the second (where Respondent is located), give district court judges the discretion to reduce backpay awards by unemployment benefits received by the employee in Title VII cases. *EEOC v. Enterprise Assn. Local 638*, 542 F.2d 579, 591 (2d Cir. 1976); *Daniel v. Loveridge*, 32 F.3d 1472, 1478 fn. 4 (10th Cir. 1994). While it does not appear that Magistrate Fox exercised his discretion to deduct DiMilta's unemployment insurance payments from his award to her, this important distinction between NLRB and Title VII law with regard to this issue is but another policy reason to support the Board's refusal to be bound by a district court's remedying of a Title VII case in remedying violations of the Act which cover the same period of time.

Finally, it is also pertinent that the Magistrate's finding that DiMilta had "retired" in October 1992, based on her deposition testimony given in February is not a conclusion, even if accepted, that can be construed as a permanent status. Thus, even if DiMilta did in fact intend to and did retire as of October 1992 or February 1993, that decision can be changed simply by a decision of DiMilta to begin looking for work. Therefore, since the Board's compliance specification covers the period through the end of the third quarter of 1995, well after her deposition testimony, and even after the Magistrate's decision, it would not be appropriate to defer totally to the Magistrate's decision in this issue.

Accordingly, based on the foregoing, I conclude that even under the principles of *Donna Lee*, the district court's decision does not preclude the Board from proceeding to remedy a violation that it had found previous to the district court litigation commencing. Therefore, I shall recommend denial of the Respondent's motion to dismiss the specification.

C. *DiMilta's Job Search*

Respondent argues that even if the Board does not give preclusive effect to the Magistrate's decision, it should reach the same conclusion that she retired as of October 1992, and that her backpay should cease at that time.

However, as I have detailed above, a discriminatee is not held to the highest degree of diligence in seeking interim em-

ployment, and need only make reasonable efforts to find work. Moreover, any uncertainty in the evidence is resolved against Respondent as the wrongdoer. *La Favorita*, supra; *Hansen*, supra; and *Regional Imports*, supra.

Here, DiMilta testified that after her layoff from Stewart, she looked for work by answering ads, mailing resumes, sending letters to restaurants, and asking business she frequented for leads. Such testimony was supported by extensive and detailed written documents, which included copies of a number of advertisements for jobs that DiMilta asserts that she answered.

I find her testimony to be credible in this regard, notwithstanding her seemingly inconsistent testimony at her Federal court depositions that she "retired" after being laid off from Stewart. Although I did not find her explanations for this deposition testimony to be entirely convincing, I do believe it reasonable that she may have been so upset at having to testify about the serious and humiliating incidents of sexual harassment,[7] that she may not have been fully concentrating on her answers to these questions.[8]

I note further that "retirement" is a term of art, and is not necessarily permanent, and does not preclude an employee from searching for work. See *Hansen*, supra at 608 (employee who listed himself as "retired" on his tax return and took early retirement from the Union to obtain pension income, still found not to preclude employee from having made sufficient search for employment); see also *Roman Iron Works*, 292 NLRB 1292 (1989) (receipt of pension benefits insufficient to show a failure to seek employment or incapacity to work).

Therefore, whether or not DiMilta may have stated or even considered herself "retired" during the applicable period is not determinative. What is dispositive is what efforts, if any, DiMilta made during this time to look for work. I conclude that her testimony, supported by her detailed and extensive records, establishes that she made more than the requisite reasonable efforts to seek interim employment. I also rely on in this respect, DiMilta's unrefuted and credible testimony that her husband was about to lose his job at the time of the alleged "retirement," which further buttresses her testimony that she would be likely to be looking for work after her layoff from Stewart.

Respondent also argues alternatively that in fact DiMilta was not laid off from Stewart as she claimed, but that she "retired" from or in effect "quit" this position at the time. That is a rather strange and somewhat inconsistent position for Respondent to take, since the Magistrate's decision, which Respondent claims should be binding on the Board, found that DiMilta was laid off from Stewart, and that she retired thereafter through an arrangement with her husband. In that connection, Fox relied on DiMilta's disposition testimony, which indicated that she had "pushed up" her retirement 6 months, since her layoff occurred 6 months before her 45th birthday, the date of her alleged "deal" with her husband for her to retire.

Indeed, I have serious reservations about whether Respondent could even legitimately raise this issue, since although it cleverly phrased its assertion that DiMilta retired "from" her job at Stewart, so as to bring it within its pleaded claim that she "retired" in October 1992. However, notwithstanding the Respondent's phraseology, Respondent's argument that DiMilta retired from" her job at Stewart is quite different from its previous assertion that based on the Magistrate's decision, she retired from being laid off from Stewart by in effect not looking for work or removing herself from the job market.

Respondent's contention that she retired "from" Stewart is tantamount to an assertion that she quit her job without justification, which claim was not included in its answer, nor in its amended answer, which I have permitted it to do over the General Counsel's objection with respect to another issue.

I do not find it necessary to decide whether or not Respondent's failure to plead or amend its answer to raise this issue precludes Respondent from raising it since I conclude that it has failed to establish that DiMilta quit or, as Respondent chose to phrase it, "retired" from her position at Stewart.

While Respondent relies heavily on the testimony of Stewart's manager, Armand DiPaolo, to contradict DiMilta's testimony that she was laid off, I cannot agree that his testimony meets Respondent's burden of establishing that DiMilta quit her job. Thus, while DiPaolo testified that he knew nothing about a layoff at the time and denied that he told DiMilta that she had been laid off, he was uncertain about the real reason that DiMilta ceased her employment at Stewart. In fact, he believed that she simply had not been called any longer by the bar manager, whose responsibility it was to staff Stewart bartenders. He based his assumption of the unemployment records of Stewart which showed that Stewart had not contested her unemployment claim and that she was still considered employed as a flex employee.

While that position by Stewart could be construed as somewhat inconsistent, it clearly does not demonstrate that she quit her job, as Respondent contends. Therefore, I conclude that Respondent has not established that DiMilta quit or "retired" from Stewart,[9] nor, as discussed above, that she retired after her layoff, or that she failed to invoke a diligent search for work.

In these circumstances, I find that Respondent has not met its burden of establishing that DiMilta's backpay should be cut off or tolled in October 1992, after the end of employment at Stewart.

D. *The Change in Operations of Respondent's Bar*

Respondent alternatively argues that its obligation to pay backpay to DiMilta terminates as of August 1, 1994, at the time that Carol Davino Enterprises Inc. began operating the bar (where DiMilta worked) as well as the restaurant and banquet phases of Respondent's business.

[7] I note in this regard that the Magistrate concluded that some of the acts of sexual harassment committed by Rothermel included physical abuse that could lead to criminal sanction.

[8] I also rely in part in making my findings here on how emotional DiMilta became while testifying in this proceeding when the subject of the sexual harassment that she suffered arose.

[9] In this respect, I also rely on, as I indicated above, the fact that her husband had lost his job in the fall of 1992. Since I found that such a development was significant in finding that DiMilta would not be likely to "retire" and not look for work after a layoff, I find it even less likely that in view of her husband's job situation, she would quit her job at Stewart.

Respondent, citing *Perma Vinyl Corp.*, 164 NLRB 968, 970 (1967), enfd. 398 F.2d 544 (5th Cir. 1968), and *American Auto Felt Corp.*, 158 NLRB 1628, 1632 (1966), argues that its backpay obligation terminated when it terminated its operation of the bar, since DiMilta had obtained substantially equivalent employment elsewhere. Once again, I disagree.

Initially, I note that Respondent has not established that DiMilta's position at Stewart was a substantially equivalent position, and in fact since the evidence establishes that it was an "on call" or "flex" job at Stewart, it is doubtful if such a showing can be made. In any event, the obtaining of substantially equivalent employment of an employee does not terminate an employee's backpay liability, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193–194 (1941), where as here the Employer is still operating a business that can offer the employee another position of employment. *Daniel's Construction Co.*, 276 NLRB 1093 fn. 3 (1985), enfd. 731 F.2d 191 (4th Cir. 1984). Moreover, whatever position DiMilta obtained at Stewart was acquired prior to the time that Respondent ceased operating the bar, so this fact cannot in my view operate to effect Respondent's liability under any circumstances.

However, a more serious question is presented as to whether the fact that Respondent is no longer in the business of operating a bar, in and of itself, is sufficient to terminate its backpay (and reinstatement) liability at the time it ceased operations. *Williams Motor Transfer*, 284 NLRB 1496, 1497 (1987). In my judgment, *Williams*, supra, is not dispositive.

Thus, unlike *Williams*, where the Employer there sold its business to another company and ceased operating, or *Perma Vinyl*, supra, whether the Employer simply closed its facility, Respondent continued to operate the hotel at the same location. All that it did was to, in effect, contract out the operation of the bar, restaurant, and banquet portions of the business to another employer. This action is little different from a situation where an employer simply closes down a department or eliminates a particular job classification or job function. That situation is precisely the kind of eventuality envisioned by the Board's traditional remedy which was issued here of requiring reinstatement to DiMilta's former job, "or if that job no longer exists, to a substantially equivalent position."

Therefore, while Respondent's decision to contract out the food service phase of its business may have established that DiMilta's job as a bartender no longer existed with Respondent, it did not extinguish the obligation of Respondent to offer her a substantially equivalent position of employment at other jobs at the hotel. Indeed Respondent attempted to fulfill that obligation by offering her a job as a front office desk in May and again in July 1995, and the Region has concluded that the July offer satisfied Respondent's obligation in that regard, and cut off her backpay at that time.

Moreover, *Daniel's Construction*, supra, provides another reason to conclude that Respondent's backpay obligation continued past August 1994. Thus I conclude, in agreement with General Counsel, that the evidence supports the conclusion that it is probable that had DiMilta not been discriminatorily terminated by Respondent, that she would have been hired by Davino after Davino began operating the food service phase of Respondent, including the bar, where DiMilta had been employed. The evidence discloses that there were two bartenders employed by Respondent, and that both of them were hired by Davino. Therefore, since 100 percent of the bartenders employed by Respondent were hired by Davino, it is certainly reasonable to conclude, which I do, that she would have been hired by Davino as well.

It is also notable that Davino hired a number of Respondent's former restaurant and banquet employees, although the record does not disclose the number of such hires. I have concluded, as noted, that Armour's testimony establishes that Davino hired all of the restaurant employees and some of the banquet employees employed by Respondent. Even if Armour's testimony is not so construed, her testimony that Davino hired at least "some" of Respondent's employees is supportive of my conclusion, that in view of Davino's hiring of 100 percent of Respondent's bartenders, DiMilta would have also been hired had she been one of these bartenders, as she should have been absent Respondent's discrimination against her.

Accordingly, based on the foregoing, I conclude that Respondent's decision to cease operating the bar, restaurant, or banquet functions at the hotel in August 1994 does not extinguish or affect its backpay liabilities to DiMilta.

E. *The Reinstatement Offers*

Respondent contends that its offer of reinstatement sent to DiMilta by letter dated May 26, 1995, was a valid, unconditional offer of reinstatement to her, and that her failure to accept this offer terminated the backpay period at that time.

The General Counsel argues initially that the offer was invalid on its face, because it did not state that Respondent was offering DiMilta employment, and the letter is dated (May 26) after the date of the alleged opening (May 23). Therefore, the General Counsel argues that since the offer was invalid, one need not examine DiMilta's reasons for rejecting it. *L'Ermitage Hotel*, 293 NLRB 924 (1989), enfd. 917 F.2d 62 (D.C. Cir. 1990), cert. denied 501 U.S. 1217 (1991); *Consolidated Freightways*, 290 NLRB 701 (1988), enfd. and modified on other grounds 892 F.2d 1052 (D.C. Cir. 1989), cert. denied 498 U.S. 817 (1990). I agree.

"It is well settled that an offer of employment must be specific, unequivocal and unconditional in order to toll backpay and satisfy a respondent's remedial obligation." *Holo-Krome Co.*, 302 NLRB 452–454 (1991). Respondent's letter merely stated that it had an immediate opening for a desk clerk position, described the hours and stated that it needed an immediate response. The letter did not make "an express offer" of the job to DiMilta. *Holo-Krome*, supra. Merely indicating that it had an immediate opening is not the same as offering the position to DiMilta. *Flatiron Materials Co.*, 250 NLRB 554 (1980). Respondent's letter is little more than an inquiry as to whether DiMilta is interested in returning to work, which does not constitute an unequivocal of reinstatement. *L'Ermitage Hotel*, supra; *Flatiron*, supra; *Barr Packing Co.*, 82 NLRB 1, 4 (1949).

Moreover, as the General Counsel also notes, the letter does not provide DiMilta with a reasonable time to respond, since an "immediate response" was called for and the position was to start on May 23, 1995, 3 days before the letter was mailed and a week before the letter was received. When such a letter is received by a discriminatee, it will be treated by the Board as invalid, only if the letter on its face makes it clear that reinstatement is dependent on the employee's returning on the specified date, or if the letter otherwise sug-

gests that the offer will lapse if a decision on reinstatement is not made by that date. *Esterline Electronics Corp.*, 290 NLRB 834, 835 (1988). Here, it is not totally clear whether or not the letter suggests that the offer will lapse if not responded to, although the statement that Respondent needed an "immediate response" tends to imply such an eventuality.

However, I need not and shall not decide this issue, since DiMilta in fact did respond to the letter and was not told that the offer had lapsed. *Esterline Electronics Corp.*, supra, does not make clear whether this additional factor makes the otherwise unreasonable length of time in the letter a moot issue. While it does provide that a discriminatee is under no obligation to respond to such a letter, it does not indicate how it will construe a situation, as here, where the discriminatee does respond and the length of time to respond is not an issue, nor a reason for the offers' rejection.

Since I have already concluded that the offer is invalid, because it was not an unequivocal offer of a job, I therefore find it unnecessary to decide whether the shortness of time to respond is another reason for that conclusion.

Moreover, I also agree with the contentions of the General Counsel, that even if the offer is considered valid on its face, that it was not an offer of substantially equivalent employment necessary to toll her backpay. Thus, while DiMilta was employed by Respondent, she worked on Mondays through Thursdays on the 11 to 7 p.m. shift. The position offered to DiMilta by Respondent was significantly different in both days and hours, since she was offered a job on Fridays, Saturdays, and Sundays (3 days as opposed to 4), and on the evening shift from 10 p.m. until the following morning. It is clear that an offer of employment to a different shift is not "substantially equivalent," *Associated Grocers*, 295 NLRB 806, 807 (1989); *Clear Pine Mouldings*, 268 NLRB 1044, 1058, 1061 (1983), nor is an offer for employment on totally different days or with fewer hours. *Preterm, Inc.*, 273 NLRB 683, 693 (1984). Therefore, for these reasons alone, the offer is invalid and DiMilta's backpay is not tolled as of May 1995.

Moreover, the offer does not provide DiMilta with substantially equivalent compensation. Thus her prior salary was $5.60 per hour plus tips averaging $1.78 per hours, which comes to $7.38 per hour. However, I also note that the specification issued, which was not contested by Respondent, was computed on the basis of a salary of $6.70 per hour as of 1994 (when Respondent ceased operating the bar), based on raises granted by Respondent. Therefore, in my view, her salary should have been at least $7.38 per hour, if not higher, based on the raises granted by Respondent to its bartenders.

Finally, Miano made it clear to DiMilta that the offer of a job for her was as a new employee, with no seniority. Such an offer is clearly violative of the very terms of the reinstatement order of the Board, and is not an offer of a substantially equivalent position of employment. *Ryder System*, 302 NLRB 608, 609 (1991); *Sumco M.F.G. Co.*, 267 NLRB 253, 258 (1983).

Therefore, I conclude that Respondent's offer in May 1995 to DiMilta was invalid and not an offer of substantially equivalent employment.

Respondent argues that if the General Counsel tolled backpay as a result of the July 25 offer, it should also have tolled it on May 26, as the two offers are "almost identical." I do not agree. The July offer, that DiMilta tentatively accepted, was substantially different from the May offer that she rejected. The July offer was for work on some day shift as her previous position, and included 3 or 4 weekdays of work, also similar to her prior job, plus work every other Sunday, which brings her total hours very close to her prior position. Additionally, the salary offered in July was $7 per hour rather than the $6 offered in May, which again brings her closer to her prior compensation.

Accordingly, since neither the May offer to DiMilta nor any of the other factors argued by Respondent (i.e., the closing of Respondent's operating the bar, of DiMilta's alleged retirement) have been found to in any way using shorten the backpay period or reduce the amount of backpay reflected in the compliance specification, I shall recommend that Respondent be ordered to pay the amounts set forth there.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Thalbo Corporation and G. B. Motel Management d/b/a Ramada Inn Newburgh, Newburgh, New York, its officers, agents, successors, and assigns, shall pay to Paulette DiMilta the sum of $40,410.24 plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.